the ground that even if the contract was absolute in form, yet it contained an implied condition that, if performance were rendered impossible without the defendants' fault, they should be relieved of liability.

The exceptions to the general rule that impossibility of performance is not a defence have crept into the law, not as excuses, but under the cover of implied conditions. In other words, the courts have held that the parties impliedly agreed there should be no performance if such contingencies arose, and so, in truth, no breach of contract resulted. This cannot be regarded otherwise than as pure fiction. As a matter of fact all thought of impossibility of performance is usually absent from the minds of the contracting parties. The defence is an equitable one, and therefore, provided beneficial results follow, the courts would be justified in holding that the implied condition relieves liability, not only where the subject-matter of the contract has been destroyed, but also where the means of performance have ceased to exist; that is, in general terms, wherever performance is rendered impossible without fault of the promisor. Indeed, even if it is insisted that the condition must be one actually intended, it seems more likely that the broader condition would be in the parties' minds than the narrower one, limited to definite objects.

It is usually to the interest of both parties that a contract be carried out. Where performance is prevented by an event, against the occurrence of which neither can reasonably be held to have warranted, both suffer a loss for which neither is responsible. In such circumstances it seems highly unjust to throw all the loss on the one whose performance may happen to have been interfered with. Much wiser would it be to excuse the breach of the express contract, and allow a recovery for benefits actually rendered in a quasi-contractual action. Had this latter remedy been earlier recognized, it is not improbable that the courts would, before this, have admitted impossibility generally as a defence. This result may now be reached, however, by the adoption of the rule suggested by the New York court, which seems not only a natural successor of the previously recognized exceptions, but likewise eminently just.

THE RIGHT TO DISPOSE OF THE BODY BY WILL. — An interesting question of first impression arises in a recent California case as to whether or not one can make a valid testamentary disposition of his body. A testator living with the defendant at the time of his death left a will urging that the manner, time, and place of his burial should be according to the defendant's wishes and directions. Under this clause the defendant claimed the right of burial, and the widow and daughter of the deceased brought suit to obtain possession of the body. In allowing a recovery the court decides that a corpse is in no sense property, that therefore it cannot be disposed of by will, and that the right of burial belongs, in the absence of statutory provision, to the next of kin. *Enos* v. *Snyder*, 63 Pac. Rep. 170 (Cal.). Though it has been held that a corpse is a species of property, *Bogert* v. *Indianapolis*, 13 Ind. 138, such a view, it would seem, is erroneous, and not in accordance with the great weight of authority. *Fox* v. *Gordon*, 16 Phila. Rep. 185. One cannot be indicted for the larceny of a corpse, *Rex* v. *Haynes*, 2 East P. C. 652; nor can the body, as in olden days, be detained for the payment of debts. *Reg.* v. *Fox*, L. R. 2 Q. B. 246. But it is to be noted, though curiously enough it is not

even suggested in the principal case, that whether a corpse be regarded as property or not is immaterial to the point at issue. For when we consider that property in a body can only begin when the living becomes inanimate, it necessarily follows that property in one's own body can never arise. It must be conceded, however, that a dead body is something of which we can predicate a right of possession for the purposes of burial. Whether we call that right a *quasi* property right or not is a matter of terminology which does not concern us. The vital question remains, Can a testator by any possible testamentary act govern the vesting of that right?

Even in the absence of testamentary disposition there is some confusion in the law as to who has the right of burial. The principal case is perhaps in accordance with the general rule in this country, that it belongs to the next of kin. *Wynkoop* v. *Wynkoop*, 82 Am. Dec. 506 (Pa.). It is held in some jurisdictions, however, that the surviving widow or widower has the right. *Hackett* v. *Hackett*, 18 R. I. 155.

Equity has also interfered in determining the right as between the widow and the next of kin. *Snyder* v. *Snyder*, 60 How. Pr. 368. The courts limit their decisions in regard to the right of burial, however, expressly to those cases where there is no testamentary provision, and the inference is that a testator may, if he sees fit, govern the vesting of this right. There are *dicta*, also, which seem to recognize such a power. *O'Donnell* v. *Slade*, 123 Cal. 585; *Pierce* v. *Swan Pt. Cemetery*, 18 R. I. 227. In the former case it is distinctly stated that an individual has a sufficient proprietary interest in his own body after death to make a valid and binding testamentary disposition of it, and in the latter it is said that such a doctrine has been recognized. In neither case, however, is the point involved. On the other hand, in England, such a doctrine has been denied, where the court rested a decision on the ground that it was impossible by will or any other instrument to dispose of one's body. *Williams* v. *Williams*, 20 Ch. D. 659. It would seem, then, though there are *dicta* to the contrary, that courts have never recognized nor given effect to such a testamentary disposition, and though perhaps it may appear that under some circumstances effect should be given to the wishes of the deceased, it is difficult to suggest on what principle this can be done.

THE NECESSITY OF NOTICE TO A GUARANTOR. — A recent Massachusetts decision presents an interesting and able discussion of the effect on a guarantor's liability of a failure by the guarantee to give notice of the default of his principal. The guaranty in this case was of the payment of rent by a lessee of the plaintiff. The guarantor received no notice of the lessee's failure to pay till fourteen months after the default occurred, and in consequence of the delay was in a worse position. Nevertheless he was held on his guaranty. *Welch* v. *Walsh*, 59 N. E. Rep. 440 (Mass). The decision goes on the ground that the guarantor, having undertaken to have a certain thing done at a certain time, is bound to see it done, and the lessor is under no duty to notify him of default. This reasoning seems sound. *Rogers* v. *Burr*, 97 Ga. 10. It is commonly held that notice is not necessary to charge a guarantor if he has suffered no detriment. *Reynolds* v. *Douglas*, 12 Pet. 497. But it is often said that the guarantor would be discharged to the extent of any loss which he